RECENT DECISIONS.

BANKRUPTCY—DISCHARGE—DEFECTIVE SCHEDULE. A voluntary bankrupt scheduled a note in the name of the payee, though he knew at the time that the plaintiff was the holder thereof. Plaintiff had received no notice of the bankruptcy proceedings until after discharge. *Held*, plaintiff can recover on the note, although under the statute plaintiff had five months after the discovery of the discharge to prove its claim in bankruptcy, and might have applied for its revocation for fraud. *Columbia Bank* v. *Birkett* (1903) 174 N. Y. 112.

§ 17 subd. 3, Bankruptcy Law of 1898, which provides that a debt is not released by discharge if not "duly scheduled in time for proof and allowance, with the name of the creditor . . . unless such creditor had notice or actual knowledge of the proceedings in bankruptcy," is construed to mean, unless he has such knowledge or notice before the proceedings occur, as the policy of the present statute is that a creditor shall have an opportunity to protect his rights in each successive proceeding as it occurs. How far the court will carry this, whether failure to give notice of the first or any subsequent proceeding, or failure to give notice of the application for discharge falls within this decision, is an open question. The case seems to be one of first impression on the point involved.

BANKRUPTCY—RIGHTS OF CREDITORS—EXECUTIONS. Sheriff levied under an execution upon a judgment obtained within four months of the filing of the petition. *Held*, that the proceeds of the execution sale, held by the sheriff, must be paid to the trustee in bankruptcy, under § 67, f, of the Bankruptcy Act. *Clarke* v. *Larremore* (1903) 188 U. S. 486.

The statute declares that all levies obtained within four months of the filing of the petition shall be deemed null and void upon bankruptcy except as to *bona fide* purchasers for value. § 67, f, Bankruptcy Act of 1898. The holding in the principal case is that as the levy was void and the property passed to the trustee, the sheriff must hold the proceeds of the sale for the trustee. *In re Fellerath* (1899) 95 Fed. 121; *in re Franks* (1899) 95 Fed. 635. This seems to be so irrespective of whether or not title passes to the judgment creditor upon the sheriff's sale, on which point there may be some doubt in New York. *Baker* v. *Kenworthy* (1869) 41 N. Y. 215; *Nelson* v. *Kerr* (1874) 59 N. Y. 225; *Wehle* v. *Conner* (1877) 69 N. Y. 546; *Kingston Bank* v. *Eltinge* (1869) 40 N. Y. 391; *Levor* v. *Seiter* (1902) 69 App. Div. 33. It would seem that under the theory of this case the proceeds could be followed into the hands of a judgment creditor, but the court declines to express an opinion on this point. See *Levor* v. *Seiter*, *supra*; *in re Blair* (1900) 102 Fed. 987. If the title passes to the judgment creditor on the sale of the property, it is difficult to see how mere change of possession from the sheriff to the creditor can change the latter's rights. *Baker* v. *Kenworthy*, *supra*.

CARRIERS—ASSUMPTION OF CONTROL BY SHIPPER. The plaintiff sues the defendant company for alleged negligence in failing to properly bed stock cars, resulting in injury to his cattle. The defendant alleges that the plaintiff undertook to give directions as to the bedding and on completion said it was satisfactory. *Held*, defendant's allegation constituted a defense. *Texas Central R. Co.* v. *O'Laughlin* (Tex. 1903) 72 S. W. 610.

When the shipper assumes control and directs method of shipment the carrier is not liable for resulting injuries, since they are caused by shipper's act. *Roderick* v. *R. R. Co.* (1873) 7 W. Va. 54; *Miltimore* v. *R. R. Co.* (1875) 37 Wis. 190. It is also held that if the shipper assents

to the preparations of the carrier he assumes the risk. *Harris* v. *R. R. Co.* (1859) 20 N. Y. 232. To excuse the carrier in case of mere assent, however, it would seem that the shipper must have knowledge of any defect or should possess an equal skill in the loading, otherwise his assent should not negative a reliance on the superior experience of the carrier. If the carrier knows that the packing or loading of the shipper may lead to injury and fails to notify him or provide against it, the shipper may recover for the carrier's negligence. *Kinnick Bros.* v. *Chicago R. Co.* (1886) 69 Iowa 665; *Powell* v. *Pa. R. Co.* (1859) 32 Pa. St. 414.

CARRIERS—BILL OF LADING INCORPORATING STATUTE—CONSTRUCTION. Butter was shipped upon the defendant's vessel for carriage from New York to London, under bills of lading incorporating § 3 of the Harter Act. The butter was damaged through the negligent operation of the refrigerating apparatus by the crew. *Held*, the refrigerating apparatus being necessary to the seaworthiness of the vessel, negligence in the management thereof was a "fault or error in the management of the vessel," and the defendants were excused. *Rowson* v. *Atlantic Transport Co.* (1903) L. J. 72 K. B. 87.

The Harter Act (U. S. Stat. at Large, Vol. 27, C. 105, Sec. 3) provides that if the owner of the vessel shall exercise due diligence to make the vessel in all respects seaworthy, he shall not be held liable for damage resulting from "faults or errors . . . in the management of the said vessel." The term "seaworthy" is held to apply to a vessel relative to her cargo; *i. e.*, seaworthiness means that the ship and her equipment shall be fit for the purpose of carrying properly the particular goods. *The Thames* (1894) 61 Fed. Rep. 1014; *Maori King* v. *Hughes* (1895) 65 J. L. Q. B. 168. In the principal case the vessel would not have been seaworthy without a refrigerating apparatus in good order. Since it was in proper order at sailing, the Act was complied with, and for the fault in management the defendant is excused. There is no American decision wherein a similar question has been raised since the passing of the Act.

CONFLICT OF LAWS—FOREIGN ATTACHMENT AS A DEFENSE TO AN ACTION ON CONTRACT. The plaintiff in each action, residing in New Jersey, rendered services to defendant in that State. The amounts due were garnished in West Virginia. One of the latter actions had proceeded to judgment; the other was pending. *Held*, the attachments cannot be pleaded in defense to these actions. *Bailey* v. *Penn. R. Co.* (N. J. 1903) 54 Atl. R. 248; *Naylor* v. *Same* (*id.*)

These cases cannot be disposed of in the same way. That a judgment in a foreign jurisdiction, prior to the commencement of the action, is pleadable in bar, *Savage's Case* (1692) 1 Salk. 291, and a mere attachment, without condemnation, before the writ is purchased, ought to be pleaded in abatement of the writ, *Brook* v. *Smith* (1694) 1 Salk. 280, represent the English doctrine, followed by a majority of the courts in this country. *Drake on Attachments*, §§ 700, 705; *Embree and Collins* v. *Hanna* (1809) 5 Johns. 101. This view is strengthened by the comity clause of the Federal Constitution. *C. R. I. & P. R. Co.* v. *Sturm* (1899) 174 U. S. 710; *Howland* v. *C. R. I. & P. R. Co.* (1896) 134 Mo. 474. The source of the confusion in the State courts lies in the attempt to define the *situs* of the debt for purposes of jurisdiction. For purposes of garnishment, the *situs* of the debt is with the garnishee, wherever he may be sued. *Minor, Conflict of Laws*, § 125 and note p. 519. On principle, there is no valid reason for not allowing a judgment, after attachment, to be pleaded in bar, and a pending action to operate as a stay, where jurisdiction is made out in the foreign court.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—LOTTERY TICKETS. The Act of Congress of March 2, 1895, c. 191, sec. 1, provides for the punishment of any one who shall cause lottery tickets to be carried from one State to another. The petitioner in *habeas corpus* was held under a war-

rant issued on a complaint based upon this statute, charging him with causing lottery tickets to be carried from Texas to California by an express company. *Held*, the statute was constitutional, as an exercise of the power to regulate interstate commerce. *The Lottery Case* (1903) 188 U. S. 321. See NOTES, p. 410.

CONTRACTS—AGREEMENT AS TO JURISDICTION. Plaintiff and defendant entered into a contract to be performed partly in Italy and partly in the United States, and it was stipulated that the Italian courts should have exclusive jurisdiction over actions thereon. This stipulation was set up as a defense to an action on the contract brought in Massachusetts. *Held*, the stipulation was not so unreasonable or such an abnegation of legal rights that the court will refuse to enforce it. *Mittenthal et al.* v. *Mascagni* (Mass. 1903) 66 N. E. 425.

It is generally held that a stipulation in a contract which ousts the courts of all jurisdiction over that contract is invalid. *Sanford* v. *Accident Ass.* (1895) 147 N. Y. 326; *Guaranty Co.* v. *Ry Co.* (1891) 139 U. S. 137. But any stipulation which affects the cause of action, not the remedy, is valid, as that an appraisal of damage shall be made before suit is brought, *Eldridge* v. *Fuhr* (1894) 59 Mo. App. 44, or that any action shall be brought before a certain time. *Ins. Co.* v. *Phœnix Co.* (1858) 31 Pa. St. 448. An agreement, however, to submit all differences to arbitration is void. *Stephenson* v. *Ins. Co.* (1866) 54 Me. 55. The principal case, though supported by a former Massachusetts case, *Daley* v. *People's Ass.* (1901) 178 Mass. 13, appears to be *contra* to the weight of authority nor is it, as stated in the opinion, according to the New York doctrine. *Benson* v. *Building Ass.* (1903) 174 N. Y. 83.

CONTRACTS—CANCELLATION BY COURT—REVIVAL OF PRIOR CONTRACT. The defendant engaged the plaintiff to procure certain contracts. The plaintiff's compensation was to be the excess of the contract price over a certain fixed sum. Later upon plaintiff's representation that he could not obtain contracts in excess of the sum fixed, it was reduced. The plaintiff immediately procured a contract much in excess of either sum, which contract was duly entered into by the defendant. The plaintiff sued for his compensation and the defendant set up fraud in inducing the second contract of agency. *Held*, the plaintiff was entitled to recover compensation on the basis of the original agreement. *Hale Elevator Co.* v. *Hale* (Ill. 1903) 66 N. E. 249.

Save the few authorities cited in the principal case and an intimation in the opinion in *Oakley* v. *Ballard* (1846) 1 Hempst. 475, there seems to have been no previous adjudication exactly in point. It would seem, however, that the court, in the exercise of its discretionary equitable powers, was fully justified in allowing the defense only on terms that the defendant should pay in accordance with the first contract of agency. This put the parties exactly where they were at the time of the fraudulent act.

CONTRACTS—MORAL CONSIDERATION. Defendant proposed to settle with creditors, among whom was plaintiff, by giving securities at an arbitrary valuation of 80% of their face value and his "moral obligation" to later take back the securities at such valuation. Plaintiff agreed and released defendant. *Held*, that such moral obligation was a sufficient consideration to support a subsequent promise by defendant to take back the securities. *Taylor* v. *Hotchkiss* (1903) 80 N. Y. Supp. 1042.

It is almost universally held that if a debtor is discharged by some positive statute or by operation of law a moral obligation to pay the debt remains and will support a subsequent promise to pay. *Turlington* v. *Slaughter* (1875) 54 Ala. 195. On the other hand if a release is given by a creditor voluntarily no such moral obligation survives. *Mason* v. *Campbell* (1880) 27 Minn. 54; *Stafford* v. *Bacon* (N. Y. (1841) 1 Hill 532. Inasmuch as the release in the principal case was given voluntarily it seems to be difficult to support the decision, for it permits the parties, by express acknowledgment to make valid as a consideration something which the law declares to be invalid.

CONTRACTS—NUDUM PACTUM. Defendant, plaintiff's judgment creditor, recovered a judgment for $226. He agreed to satisfy this if plaintiff would pay him $50 and give his note for $50, provided the note was paid at maturity. Plaintiff paid the cash and the note, obtaining a receipt in full, but defendant refused to satisfy the judgment. *Held*, defendant's promise was without consideration and unenforceable. *Shanley* v. *Koehler* (N. Y. 1903) 80 App. Div. 566.

The doctrine that the payment of part of a debt is not a sufficient consideration upon which to found a promise to satisfy the whole, though often criticized, *Clayton* v. *Clark* (1896) 74 Miss. 499, is the general rule both in England and the United States. *Foakes* v. *Beer* (1884) 9 App. Cas. 605; *Ins. Co.* v. *Kink* (1884) 110 Ill. 538. The courts, however, interpret the rule strictly, and it is held in most jurisdictions that the giving of a promissory note by the debtor, since he is not bound so to do, will support the creditor's promise, *Sibree* v. *Tripp* (1846) 15 M. & W. 22, but see, *contra*, *Parrott* v. *Colby* (N. Y. 1875) 6 Hun. 55. The principal case may be reconciled with the general rule if the note is considered to have been taken merely as a means of getting the money and not in and for itself. *Bliss* v. *Shwarts* (1875) 65 N. Y. 444. But the receipt in full given by the creditor would seem to come within the rule of *McKenzie* v. *Harrison* (1890) 120 N. Y. 260, that such a receipt is evidence of a gift by the creditor of the remainder of the debt.

CONTRACTS—NUDUM PACTUM. Plaintiff entered into a contract with W & B whereby he was to transfer certain promissory notes in exchange for a promissory note of W & B. He refused to perform unless there were more names on the note of W & B and they obtained the signature of defendant who set up lack of consideration. *Held*, W. & B, in obtaining defendant's signature, waived the first contract, and the consideration for defendant's promise was the transfer of the notes to W & B. *Merchants Nat. Bank of Cincinnati* v. *Ryan* (Ohio 1903) 66 N. E. 526.

The question whether or not the performance or promise to perform an existing contractual duty is a good consideration on which to support a promise has been answered by the courts in various ways. In England and some few American jurisdictions it is held that if the duty is owing the promisor there is no consideration but if the duty is owing a third person there is consideration. *Scotson* v. *Pegg* (1861) 6 H & N 295., *Humes* v. *Decatur Co.* (1893) 98 Ala. 461. In Massachusetts there is good consideration in both cases. Where the duty is owing the promisor the subsequent contract is considered in and of itself to be a rescission of the former. *Rollins* v. *Marsh* (1880) 128 Mass. 116. In New York, and generally, it is held that this second contract will not have this effect unless such is the agreement between the parties, *Vanderbilt* v. *Schreyer* (1883) 91 N. Y. 392, *Lingenfelder* v. *Brewing Co.* (1890) 103 Mo. 578, and hence there can be no consideration for the second contract. Nor by the weight of authority will the promise to fulfill or the fulfillment of a duty owing a third person be a good consideration. *Reynolds* v. *Nugent* (1865) 25 Ind. 328.

CORPORATIONS—ILLEGAL INCORPORATION—STOCKHOLDERS' LIABILITY INTER SESE. Plaintiff was minority stockholder in an association acting as a corporation, a *bona fide* attempt to incorporate having failed. He sued the defendant, majority stockholder, for an accounting on a partnership basis. *Held*, as no partnership was intended, they were not liable as partners *inter sese*, but were bound by the terms of the charter, that representing the contract between the parties. *Cannon* v. *Brush Electric Co. et al.* (Md. 1903) 54 Atl. 121. See NOTES, p. 408.

CORPORATIONS—MERGER. The Northern Securities Company, an independent corporation, acquired the majority of the stock of the Northern Pacific and Great Northern Railways, in pursuance of an agreement between the stockholders of these railways. *Held*, this put the control of the N. P. R. and the G. N. R. in the hands of the Northern Securities Company, and, therefore, as it thus had the power to restrain trade

between states, there was a violation of the Anti-Trust Act of 1890, as judicially interpreted. *United States* v. *Northern Securities Co. et al.* (C. C., D. Minn. 1903) 120 Fed. 721. See NOTES, p. 404.

CRIMINAL LAW—BRIBERY OF OFFICER—ILLEGAL ARREST. Petitioner was illegally arrested and offered the officer money to release him. A statute made it a misdemeanor to bribe an officer to permit any person in his custody to escape. *Held*, the arrest being illegal, the statute did not apply. *Ex parte Richards*, (Tex. 1903) 72 S. W. 838.

The case was decided on the authority of *Moore* v. *State* (Tex. 1902) 69 S. W. 521. The latter case seems to be the result of a wrong interpretation of an earlier Texas case, *Moseley* v. *State* (1888) 25 Tex. App. 515, where an officer was held guilty for accepting a similar bribe although the arrest was illegal. The court in that case put its decision on the ground, not that the defendant was estopped to set up the illegality because it was his act, as intimated in *Moore* v. *State*, *supra*, but that the illegality of the arrest was irrelevant and immaterial. The court said: "The law abhors even a tendency to official corruption and it is official corruption that this statute is intended to punish." At common law the crime of bribery was the presenting "to the official mind the idea of money not merited, but as a return for a wrong act or for fresh haste in doing a right one." 2 *Bishop's Criminal Law*, 8th ed. § 85 n, 1, 2. The question of the jurisdiction of the officer bribed to do the act is immaterial as the thing sought to be prevented is official corruption. *State* v. *Ellis* (1868) 33 N. J. L. 102.

CRIMINAL LAW—REASONABLE DOUBT—INSTRUCTIONS. The court in instructing the jury told them that a reasonable doubt was "such a doubt as the jury were able to give a reason for" and not a possible or imaginary doubt. *Held*, the instructions were not erroneous. *State* v. *Patton* (Kan, 1903.) 71 Pac. 840.

Something more than the mere weight of evidence of the civil trial is required to convict of crime. This requisite is usually defined as belief beyond a reasonable doubt. It would seem that the analysis of reasonable doubt given by the court, though supported by considerable authority [*accord: The People* v. *Guidici* (1885) 100 N. Y. 503; *Hodge* v. *The State* (1892) 97 Ala. 37; *Emery* v. *The State* (1899) 101 Wis. 627; *contra: Klyce* v. *State* (1900) 78 Miss. 450; *Morgan* v. *The State* (1891) 48 Ohio St. 371], was the result of attempting a judicial definition where it is peculiarly the province of the juror to define for himself. The fundamental requirement is not so much the power to give specific reasons as that there be a moral certainty. *Miles* v. *U. S.* (1880) 103 U. S. 304; *Commonwealth* v. *Webster* (Mass. 1850) 5 Cush. 295. ALDERSON B., seems to best convey the true idea when he says the jury must be satisfied "that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person." *Hodge's Case* (1838) 2 Lewin C. C. 227.

DOMESTIC RELATIONS—DOWER—FRAUDULENT SALE.—The plaintiff sought to enforce her inchoate right of dower against her husband, one of the defendants, who by collusion with the other defendant, a corporation, of which he owned nearly all the stock, sold to it by a foreclosure sale the mortgaged property in which the plaintiff claimed dower. *Held*, equity would not permit dower to be destroyed by such a conspiracy. *Poillon* v. *Poillon et al.* (1903) N. Y. Supr. Ct., Apl. Term (unreported).

In reaching this equitable result it was not necessary for the court to disregard the sound and well established principle that a corporation is an entity, separate and distinct from its shareholders. *The Queen* v. *Arnaud* (1846) L. J. 16 Q. B. (n. s.) 50, and that the corporation and not the stockholders own the corporate property. *Gallagher* v. *Germania Brewing Co.*, (1893) 53 Minn. 214. As equity in its desire to protect dower will set aside a sale made by a husband immediately before death with intent to deprive the wife of dower, if the grantee was cognizant of this intent, *Brewer* v. *Connell*, (Tenn. 1851) 11 Hump. 500, or a

fraudulent conveyance immediately before marriage, if the conveyance was voluntary, *Swaine* v. *Perine* (1821) 5 Johns. Ch. 482, so *a fortiori* equity should set aside a sale made after marriage by the husband to a purchaser who knows the sale is to deprive the wife of dower, *Buzick* v. *Buzick* (1876) 44 Iowa 259, and this would be true whether the grantee was a natural or an artificial person.

EQUITY—INJUNCTION—PUBLIC CONVENIENCE. In constructing the subway in Park Avenue, an unauthorized deviation from the specifications brought the work nearer to plaintiff's house than before. The Acts authorizing the work, however, permitted amendment of the specifications. Plaintiff sought to enjoin the construction, alleging that a nuisance was being maintained and that from the operation of the subway material injury from vibration would result. *Held*, an injunction must be refused. *Barney* v. *City of New York*, (1903) 39 Misc. 714. See NOTES, p. 413.

EVIDENCE—IMPEACHMENT—REFRESHING MEMORY OF WITNESS. Plaintiff's witness unexpectedly gave adverse testimony, in conflict with prior statements in an affidavit, and counsel was allowed to cross-examine from the affidavit, having proved that it was verified by the witness. *Held*, not an abuse of discretion; the rule that a party cannot impeach his own witness does not preclude inquiry as to such statements, directed to refreshing his memory. *Maloney* v. *Martin* (1903) 80 N. Y. Supp. 763.

The principal case follows *Bullard* v. *Pearsall* (1873) 53 N. Y. 230. A party, surprised by hostile testimony from his own witness, contradictory to former statements or testimony, is permitted, by the weight of authority, to cross-examine him. *Greenleaf*, *Evidence*, 15th ed. § 444 (a), *McNerney* v. *Reading City* (1892) 150 Pa. 611; but is not permitted to assume an attitude repugnant to his general representation of the credibility of the witness. *White* v. *State* (1888) 87 Ala. 24. Such proof should not be admitted without accurate definition of the time, place and occasion of making the previous statements. *St. Clair* v. *U. S.* (1894) 154 U. S. 134 at 150; 17 & 18 Vict. c. 125, Sec. 22. The trial court is given a large discretion. *Fisher* v. *Hart* (1892) 149 Pa. 232. In *Putnam* v. *United States* (1896) 162 U. S. 687, the surprise doctrine is rejected. The court holds also that the right to refresh the memory of the witness is confined to the introduction of matter contemporaneous with the occurrences as to which the witness is called upon to testify. The tendency is to restrict the exception to the impeachment rule.

EVIDENCE—PRIVILEGE OF COUNSEL. In summary proceedings to dispossess a tenant where the question was whether an ancestor of tenants was in possession under a lease from plaintiff's ancestor, *held*, it was not an invasion of the privilege of counsel to require counsel for tenants, by subpœna *duces tecum*, to produce the lease which it was claimed had been signed by tenant's ancestor. *Jones* v. *Reilly* (1903) 174 N. Y. 97.

Before the enactment of the provision requiring parties to an action to be examined at the instance of the adverse party, a party could not be compelled to produce papers to be used against him as evidence. This privilege extended to the attorney for the possession of the attorney was considered the possession of the party. *Bank of Utica* v. *Hillard* (N. Y. 1826) 5 Cowen 419. But it was the province of the court to determine whether the documents were privileged. *Copeland* v. *Watts* (1815) 1 Starkie 95. Inasmuch as by a change in the law a defendant can now be compelled to produce documents in his possession, the decision in the principal case that an attorney may be required to produce any paper which his client could have been compelled to produce is correct, for the privilege of the attorney was the privilege of the client. *Mitchell's Case* (1861) 12 Abb. Prac. 249.

EVIDENCE—PRIVILEGE OF WITNESS—INCRIMINATING ANSWER. In proceedings against the keeper of a gambling house, the relator was summoned as a witness. He refused to answer certain questions on the ground that the answers would tend to incriminate him. N. Y. Penal Code § 342, in

the chapter relating to "Gaming," provides: "No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter, upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any criminal investigation or proceeding." *Held*, § 342 falls short of granting complete immunity to the witness, and therefore, contravenes N. Y. Const. Art. I, § 6, which provides that no person can be compelled in any criminal case to be a witness against himself, and hence the defendant was not in contempt in refusing to testify. *People ex. rel. Lewissohn* v. *O'Brien* (1903) 80 N. Y. Sup. 816.

This decision is directly opposed to *People* v. *Kelley* (1861) 24 N. Y. 74, where it was held that the constitution did not protect a witness from a question which might be the means of furnishing other evidence against him in some future proceeding. *Higdon* v. *Heard* (1853) 14 Ga. 255; *Bidgood* v. *State* (1888) 115 Ind. 275; *La Fontaine* v. *Southern Underwriters* (1880) 83 N. C. 132 *accord*. *Emery's Case* (1871) 107 Mass. 172 and *Cullen* v. *Commonwealth* (1873) 24 Grat. 624 are *contra*. The similar provision in the Federal Constitution was passed upon by the Supreme Court in *Counselman* v. *Hitchcock* (1891) 142 U. S. 547. *People* v. *Kelley*, *supra*, was disapproved and it was held that a witness should be protected in every case in which complete immunity against future prosecution for the offense to which the question relates, was not given. In *People* v. *Forbes* (1894) 143 N. Y. 219 the precise question in *People* v. *Kelley* was not before the court, but they fully approved of the doctrine of *Counselman* v. *Hitchcock*, *supra*.

INSURANCE—ACCIDENT POLICY—SUBROGATION. The holder of an accident policy was injured through the negligence of a railway company with which he settled and then sued the insurer for the stipulated indemnity of $10 a week. The action was resisted on the ground that the settlement had deprived the insurer of his right of subrogation against the railway company. *Held*, the doctrine of subrogation is not applicable to accident insurance, and the insured might recover. *Ætna Life Ins. Co.* v. *Parker & Co.* (Texas 1903) 72 S. W. 168.

The case is sound. In fire and marine insurance the contract is strictly one of indemnity, and the insurer is therefore entitled to set-off in an action on the policy, any sum the insured has recovered from the party who caused the loss, or to the insured's right of action against such party. *Ins. Co.* v. *R. R. Co.* (1878) 73 N. Y. 399; *Liverpool Steam Co.* v. *Phenix Ins. Co.* (1889) 129 U. S. 397 at 462. Life insurance is not a contract of indemnity, *Dalby* v. *Assurance Co.* (1854) 15 C. B. 365 and subrogation is not allowed. *Conn. Mutual* v. *N. Y. & N. H. R. R.* (1856) 25 Conn. 265; *Ins. Co.* v. *Brame* (1877) 95 U. S. 754. The principal case is based on the analogy between life and accident insurance. The contract in each is not to indemnify, but to pay a certain stipulated sum on the happening of a certain event.

INSURANCE—AGENCY—ESTOPPEL. Plaintiff took out insurance with defendant and after loss sued, the insurance company defending on the ground that representations in the application were untrue. Plaintiff's statements to defendant's agent were true but the agent inserted false statements in the application. The plaintiff then signed the application which contained an express limitation on the agent's authority. *Held*, the defendant was estopped to deny the truth of the representations. *Fidelity Mut. Fire Ins. Co.* v. *Lowe* (Neb. 1903) 93 N. W. 749.

The decision is in accord with the weight of authority. *Hartford Life & Annuity Ins. Co.* v. *Gray* (1875) 80 Ill. 28; *Rogers* v. *Phœnix Ins. Co.* (1889) 121 Ind. 570; *Kister* v. *Lebanon Mut. Ins. Co.* (1889) 128 Pa. St. 553; *Stone* v. *Hawkeye Ins. Co.* (1886) 68 Iowa 737; *Hanson* v. *The Milwaukee Mechanics' Mutual Ins. Co.* (1878) 45 Wis. 321; *Bennett* v. *Agr'l Ins. Co. of Watertown* (1887) 106 N. Y. 243. To reach this result the courts have broken the parol evidence rule, and have ignored the negligence of the insured in signing the application without knowing its contents, and the limitation to the agent's authority brought to the

notice of the insured through the application. On strict legal principle the opposite conclusion should have been reached. *N. Y. Life Ins. Co.* v. *Fletcher* (1886) 117 U. S. 519; *Ryan* v. *World Life Ins. Co.* (1874) 41 Conn. 168; *Wilson* v. *Conway Fire Ins. Co.* (1856) 4 R. I. 141.

INSURANCE—REDUCTION OF POLICY BY INSURER—REMEDY OF INSURED. Defendant association issued certificates promising to pay $5,000 on the death of the member holding same. A subsequent by-law reduced the amount payable on certificates previously issued to $2,000. One holder treated the contract as broken and sued for the premiums paid. *Held*, he could recover. *Black* v. *A. L. of H.* (C. C. E. D. Pa. 1903) 120 Fed. 580. A second holder, after notice of the by-law, tendered dues on the $5,000 policy, which defendant declined. The holder then sued for damages for breach of contract. *Held*, (PARKER, C. J., BARTLETT and MARTIN JJ., dissenting), there had been no breach, as the by-law was void and the original contract unimpaired, plaintiff's remedy being to keep the contract alive by a regular tender of premiums or to apply to a court of equity to restrain the defendant from proceeding under its void by-law. *Langan* v. *A. L. of H.* (1903) 174 N. Y. 266.

It seems impossible to support the New York case. The insured, on a breach by the insurer, may rescind the contract and recover the premiums paid, *Meade* v. *Ins. Co.* (N. Y. 1875) 51 How. Prac. Rep. 1, or he may sue for the breach and recover damages. *Id., note; Keener on Quasi-Contracts* 298. See also *McKee* v. *Ins. Co.* (1859) 28 Mo. 383. The case, therefore, must rest entirely on the proposition that there was no breach by the defendant. But the doctrine of anticipatory breach is certainly recognized in New York. *Burtis* v. *Thompson* (1870) 42 N. Y. 246, and it would seem that, aside from the by-law cutting down the policies, the defendant broke the contract when it declined the premiums and refused to recognize the original policy as still in force. The Federal case is well supported by authority. *McKee* v. *Ins. Co., supra; Ins. Co. v. McAden* (Pa. 1885) 1 Atl. 256; *Van Warden* v. *Assurance Society* (1896) 99 Ia. 621.

LIBEL—PRIVILEGED COMMUNICATION—JUDICIAL PROCEEDINGS. In an action for libel the plaintiff claimed that the defendant, in a bill filed to enjoin the issuance of certain bonds authorized at a city election, had falsely accused the plaintiff of voting illegally at said election. *Held*, the publication being in a pleading and being pertinent to the issue was absolutely privileged. *Crockett* v. *McLanahan* (Tenn. 1903) 72 S. W. 950.

It has always been the policy of the law to protect absolutely those who make statements in the course of judicial proceedings—provided such statements are, on their face, pertinent to the issue. *Henderson* v. *Broomhead* (1859) 4 H. & N. 569; *Link* v. *Moore* (1895) 84 Hun 118; *Jones* v. *Brownlee* (1901) 161 Mo. 258. Only one case is *contra*.—*Ruohs* v. *Baeker* (1871) 6 Heisk. 395. It is there held that such statements, when they refer to a stranger to the record, as in the principal case, are only conditionally privileged.

MORTGAGES—PARTIAL ASSIGNMENT OF DEBT—PRIORITIES. A mortgagee, after recovering judgment on the debt and securing a decree of foreclosure, assigned at the same time twelve-fifteenths of the judgment in twelve equal parts. Of these eight were thereafter transferred to W. and the other four reassigned to the mortgagee. In an action to revive the judgment and decree, *held*, the twelve-fifteenths assigned were entitled to be satisfied prior to the three-fifteenths never assigned by the mortgagee. *Alden* v. *White* (Ind. 1903) 66 N. E. 509. See NOTES, p. 411.

NEGOTIABLE PAPER—COLLATERAL SECURITY FOR ANTECEDENT DEBT. The plaintiff received a note as collateral security for an antecedent debt. The defendants alleged that they were accommodation indorsers and the note was fraudulently diverted. *Held*, § 51 N. I. L. does not change the New York rule that one who acquires commercial paper as collateral security for a preexisting debt is not a holder for value. *Sutherland* v. *Mead et al.* (N. Y. 1903) 80 App. Div. 103.

Prior to the statute the authorities were in an irreconcilable conflict, arising under the decision of KENT, C. in *Bay* v. *Coddington*, affirmed (1822) 20 Johns 637. This holding was contrary to English authority, *Bosanquet* v. *Dudeman* (1814) 1 Stark 1, and was subsequently dissented from by STORY J. in *Swift* v. *Tyson* (1842) 16 Peters 1, holding that an instrument taken in payment of or as security for a pre-existing debt constituted the transferee a holder in due course. This rule has since represented the weight of authority in England and the United States. In New York, however, the doctrine of *Bay* v. *Coddington* was reaffirmed in *Stalker* v. *McDonald* (1843) 6 Hill 93. Chancellor KENT in commenting upon the last case admitted that he had changed his opinion and agreed with the doctrine of *Swift* v. *Tyson*, *supra*, as the "plainer and better view." *Commentaries* Vol III § 81, note b. Under the statute, § 51, both by its language and clear intendment, one taking a bill or note in payment of or as security for a pre-existing debt is deemed a holder for value. To further substantiate this view we have the statemeut of its draftsman that "this section makes an important changes in the law of New York. It abolishes the rule in the leading case of *Coddington* v. *Bay*." *Crawford's Neg. Inst. Law of N. Y.*, 2nd ed., § 51, n. (b). Only one case has arisen under the statute prior to the principal case and that clearly recognizes the change in the rule. *Brewster* v. *Shrader* (1899) 26 Misc. 480. The importance of uniformity upon this rule of commercial law is great and after, as was supposed, the statute had effected a concord the decision in the principal case is a surprise.

NEGOTIABLE PAPER—PAYEE AS HOLDER IN DUE COURSE. The defendant drew a check payable to the plaintiff, giving it to her husband to deliver to the plaintiff in satisfaction of defendant's indebtedness. The husband fraudulently delivered the check in liquidation of his personal debt to the plaintiff. *Held*, the payee, accepting in good faith and for value is a holder in due course and not subject to the defense of fraud. *Boston Steel and Iron Co.* v. *Steuer* (Mass. 1903) 66 N. E. 646.

The status of a payee taking a bill or check from a third party has not been clearly defined either under the English Bills of Exchange Act or under the Negotiable Instruments Law. Prior to the Bills of Exchange Act the prevalent practice of merchants to buy bills or checks payable to their creditors was well recognized, and the payee was deemed a holder in due course, not subject to personal defenses either between the "remitter" and the drawer, or between himself and drawer. *Porier* v. *Morris* (1853) 2 E. & B. 89; *Watson* v. *Russel* (1862) 3 B. & S. 34. Whether the Bills of Exchange Act (1882) § 29, embodied in the N. Y. Negotiable Instruments Law § 91 changes this rule of the law merchant is the question in the principal case. According to the definition in § 91 sub. sec. 4, a holder in due course takes by negotiation. The form of transfer in the principal case is not provided for in § 60 dealing with negotiation. The decision if it is to be supported must rest on the ground that the statute was not intended to change the rule of the law merchant. This custom has no application to the case of a note. *Herdman* v. *Wheeler* (1902) 1 K. B. 361.

PLEADING AND PRACTICE—ATTORNEY'S LIEN—ENFORCEMENT BY EQUITABLE ACTION. The plaintiff, who had a written agreement with his attorney for a portion of the prospective recovery, settled with the defendant before judgment, gave a release, received payment and went to Norway. *Held*, the lien, given by § 66 N. Y. Code Civ. Proc., attaches to the fund created by the settlement, and the attorney can enforce it by an equitable action against the adverse party. *Fischer-Hansen* v. *Brooklyn Heights R. Co.* (N. Y. 1903) 66 N. E. 395.

Under the old Code, the attorney was given no protection before judgment, except in case of a collusive or fraudulent settlement, and then for his costs only. *Coughlin* v. *N. Y. C. & H. R. R. Co.* (1877) 71 N. Y. 443. In the case of *Peri* v. *N. Y. C. & H. R. R. Co.* (1897) 152 N. Y. 521, under § 66, as amended in 1879, the attorney was held to be an equitable assignee of the cause of action to the extent of his lien. The procedure

authorized in the last clause of § 66, added in 1899, for the enforcement of the lien, was held not to apply where the attorney sought to collect from the adverse party. *Rochfort* v. *Metro. St. R'y. Co.* (1900) 50 App. Div. 261. He was still held to the often inadequate remedy of prosecution to judgment. A successful attempt to collect the amount of the lien in an action of an equitable nature was made in *Fenwick* v. *Mitchell* (1901) 34 Misc. 617. For a discussion of the subject of attorney's lien and the rule laid down in the principal case, see 2 COLUMBIA LAW REVIEW, 449.

REAL PROPERTY—IMPLIED COVENANT FOR QUIET ENJOYMENT. The plaintiff brought an action for breach of an implied covenant for quiet enjoyment against the defendant for acts done by the owner of the premises, the defendant's lessor. *Held*, a covenant for quiet enjoyment against acts of parties other than the lessor and those claiming under him would not be implied. *Jones* v. *Lavington*, (1902) L. J. 72 K. B. 98.

This decision on its facts can be distinguished from the recent English case of *Budd-Scott* v. *Daniel* (1902) 2 K. B. 351, and the line of decisions it follows, 3 COLUMBIA LAW REVIEW 43, which hold covenants for quiet enjoyment against acts of the lessor and those claiming under him will be implied, without the use of technical words, from the relation of landlord and tenant. But in avoiding a decision of this question, the court in the principal case gave a narrower definition to covenants for quiet enjoyment than is warranted by the authorities. *Howard* v. *Doolittle* (1854). 3 Duer 464; *Rawle on Covenants for Title*, 5th Ed. § 91.

REAL PROPERTY—PERCOLATING WATERS—CORRELATIVE RIGHTS. Plaintiff brought an action to restrain the defendant from interfering with and wasting sub-surface waters which served in part to support a spring upon plaintiff's land. It was the plaintiff's business under its charter to supply the city with water. The defendant dug a trench on his land in which he collected the water and then turned it to waste. *Held*, though the owner of land may collect percolating waters thereon for the improvement of his own premises or for his own beneficial use, he must not, for the sole purpose of wasting them, divert such waters, which would otherwise be appropriated by his neighbor for the general welfare of the people. *Stillwater Water Co.* v. *Farmer* (Minn. 1903) 93 N. W. 907.

The court recognizes that it is taking an advanced position in deciding that the doctrine of reasonable use and correlative rights is applicable to percolating waters. The decision is opposed to the general line of authorities and in fact amounts to judicial legislation. *Chatfield* v. *Wilson* (1855) 28 Vt. 49; 1 COLUMBIA LAW REVIEW 120, 133, 505; 3 *id.* 109. In *Forbell* v. *City of New York* (1900) 164 N. Y. 522, it was held that a municipal corporation could not for the purpose of sale drain the neighboring land of subsurface water by an extensive system of pipes. In the principal case the waste of the defendant prevented the plaintiff from selling the water.

SALES—RESCISSION FOR FRAUD—DAMAGES. Plaintiff was induced by fraud to sell and ship goods to the defendant, who was totally insolvent and did not intend to pay. On learning the facts plaintiff rescinded the sale and reclaimed the goods. He then brought an action for fraud and deceit, alleging as damages the "expense incurred in reclaiming and recapturing the goods." *Held*, he could not recover. *Bacon* v. *Moody* (Ga. 1903) 43 S. E. 482.

The case is clearly wrong. The court says: "The action for deceit is founded on the contract, and proceeds in affirmance of it; and when the vendor rescinds the contract there is nothing on which to base the action for deceit. The remedy by action for deceit is totally inconsistent with a rescission of the contract." That an action for fraud and deceit is an action on contract is indeed a new proposition. It is, of course, an action in tort. Where, after rescission for fraud, the defrauded vendor finds himself still far from whole, it is strange law which makes him suffer the loss and allows the defrauding vendee to go absolutely free. The correct view was suggested in an earlier Georgia case. *A. & L. R. R.* v. *Hodnett* (1859) 29 Ga. 461, at 467. The exact question is considered in

Warren v. *Cole* (1867) 15 Mich, 265; *Lenox* v. *Fuller* (1878) 39 Mich. 268, and in *Bigelow on Frauds*, 67.

TAXATION—NEW YORK SPECIAL FRANCHISE TAX LAW. *Held*, the so-called Special Franchise Tax Law, Chap. 712 Laws of 1899 is not in violation of the home rule provision (Art. X. sec. 2) of the New York Constitution. *People ex rel. Metropolitan Street R. Co.* v. *State Board of Tax Commissioners* (N. Y. 1903) N. Y. Law Jour., May 11, 1903.

The court in reversing the Appellate Division holds that the function of assessing the special franchise is not exclusively local in character on the ground that the franchise itself is not essentially local but may extend beyond the accustomed jurisdiction of the local assessors. The court regards the tangible property as an inseparable part of the special franchise which must be assessed with it. See 3 COLUMBIA LAW REVIEW, 267, 287.

TORTS—INTERFERENCE WITH BUSINESS RELATIONS—RIGHT TO INJUNCTION. Defendants, officers of a labor union, threatened a strike unless certain persons would break contracts with plaintiff, because the latter had refused to recognize defendants' union. *Held*, plaintiff was entitled to an injunction restraining defendants from interfering with his business. *Beattie* v. *Callahan* (1903) 81 N. Y. Supp. 413.

The fact that the defendants procured an actual breach of contract between plaintiff and a third party, would seem to bring this case within the principle of *Lumley* v. *Gye* (1853) 2 E. & B. 216 cf. *Rice* v. *Manley* (1876) 66 N. Y. 385; but see *Ashley* v. *Dixon* (1872) 48 N. Y..430. The court, however, rests its decision upon the general right of plaintiff to pursue his business unmolested. *National Protective Association* v. *Cumming* (1902) 170 N. Y. 315, is distinguished from the present case and reliance is placed upon *Curran* v. *Galen* (1897) 152 N. Y. 33. [See comment on these cases in 2 COLUMBIA LAW REVIEW 400 and 554.] The effect of the decision is that a desire on the part of the representatives of a labor union to enforce recognition of their organization by an employer of labor, is not such a legitimate "trade motive," as to justify interference with his business relations.

TORTS—NEGLIGENCE—DISCLOSURE OF TELEGRAPH CALLS. Defendant's operator disclosed to a stranger the "call" for a certain town. Subsequently the stranger tapped the wires, and, using the information thus obtained, sent a forged telegram to the plaintiff bank, which without negligence on its part, was induced to pay a forged draft. *Held*, the operator's act constituted negligence in the defendant, the negligence was the proximate cause of the bank's loss, and the defendant was liable. *Western Union Telegraph Co.* v. *Uvalde Nat. Bank* (Tex. 1903) 72 S. W. 232.

There is little authority exactly in point, but the decision seems correct. Telegraph companies are, in their duty toward the public, somewhat analogous to common carriers. Inviting the confidence of the public in the transaction of important business, they incur a corresponding obligation to keep their communications private. Having failed in this duty, the company should be liable for the consequences. *Bank of Cal.* v. *W. U. Tel. Co.* (1877) 52 Cal. 280. In *Pacific Postal Tel. Co.* v. *Bank of Palo Alto* (1901) 109 Fed. 369, and *Magowirk* v. *W. U. Tel. Co.* (1901) 79 Miss. 632, the companies were held liable for the fraud and collusion of their own agents, and in *Elwood* v. *Tel. Co.* (1871) 45 N. Y. 549 the company was held liable for the negligence of its operator in sending a forged telegram when the circumstances of the sending should have raised his suspicions.

TRUSTS—INDEMNITY—LIABILITY OF CLUB MEMBER. The administrator of a trustee for the New South Wales Club sued the defendant, a member of the club, for indemnity from a liability sustained by reason of the trustee's ownership of the club premises. *Held*, the club member was not liable to indemnify the trustee in the absence of a rule of the club imposing such liability. *Wise* v. *Perpetual Trustee Co.* (1903) 72 L. J. P. C. 31. See NOTES, p. 407.